

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION

JONATHON WORK,

Petitioner,

vs.

JAMES SALMONSEN, ATTORNEY  
GENERAL OF THE STATE OF  
MONTANA,

Respondents.

CV 23-24-BU-BMM

ORDER

Petitioner Jonathon Work (“Work”) filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.) At the time of filing the petition, Work was a state prisoner proceeding pro se; Work has since been released from custody. *See* (Doc. 9.)

Work was directed to show cause as to why the matter should not be dismissed as untimely and/or procedurally defaulted. (Doc. 13.) The Court’s order explained the showing that Work was required to make to overcome each of the procedural hurdles. (*Id.* at 5–9.) Work was given 45 days within which to prepare his response and was informed that failure to timely comply with the Court’s order would result

in dismissal of the petition. (*Id.* at 10–11.) Work did not respond to this Court’s order.

### **Failure to Prosecute**

Fed. R. Civ. P. 41(b) authorizes the Court to dismiss an action “[i]f the plaintiff fails to prosecute” the action or fails to comply with other rules of the Court.

*See also Applied Underwriters v. Lichtenegger*, 913 F. 3d 884, 889 (9<sup>th</sup> Cir. 2019) (citation omitted). A court may dismiss an action based on a party’s failure to prosecute an action, obey a court order, or comply with the local rules. *See Ferdik v. Bonzelet*, 963 F. 2d 1258, 1260–61 (9<sup>th</sup> Cir. 1992) (dismissal for failure to comply with a court order to amend a complaint). A court may dismiss a case on its own without awaiting a motion. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962); *Hells Canyon Preservation Council v. United States Forest Serv.*, 403 F. 3d 683, 689 (9<sup>th</sup> Cir. 2005).

In determining whether a petitioner’s failure to prosecute warrants dismissal of the case, the Court must weigh the following five factors: “(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Carey v. King*, 856 F.2d 1439, 1440 (9<sup>th</sup> Cir. 1988) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir.1986)). “The first two of these factors favor the imposition of

sanctions in most cases, while the fourth factor cuts against a default or dismissal sanction. Thus, the key factors are prejudice and availability of lesser sanctions.” *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir.1990).

“The public’s interest in expeditious resolution of litigation always favors dismissal.” *Yourish v. California Amplifier*, 191 F. 3d 983, 990 (9<sup>th</sup> Cir. 1999). Work has failed to comply with this Court’s show cause order. This factor weighs in favor of dismissal.

Likewise, the second factor supports dismissal. “The trial judge is in the best position to determine whether the delay in a particular case interferes with docket management and the public interest.” *Pagtalunan v. Galaza*, 291 F. 3d 639 (9<sup>th</sup> Cir. 2002). The Court cannot manage its docket if Work refuses to comply with the Court’s orders. Work’s case has consumed judicial resources and time that could have been spent on other matters. This factor also favors dismissal.

The third factor requires the Court to weigh the risk of prejudice to the respondents. A rebuttable presumption of prejudice to respondents arises when a petitioner unreasonably delays prosecution of an action. *In re Eisen*, 31 F.3d 1447, 1452–53 (9<sup>th</sup> Cir. 1994). Nothing suggests that such a presumption is unwarranted in this case, although it does not weigh strongly against Work in the present case.

The Court has considered less drastic alternatives. Alternatives may include “allowing further amended complaints, allowing additional time, or insisting that

appellant associate experienced counsel.” *Nevigel v. North Coast Life Insurance Co.*, 651 F. 2d 671, 674 (9<sup>th</sup> Cir. 1981). Although less drastic alternatives to dismissal should be considered, the Court is not required to exhaust all such alternatives prior to dismissal. *Id.* Work was afforded an adequate amount of time in which to prepare and file his response to the Court’s order. Further, Work was advised that his failure to respond to the Court’s order would result in dismissal. (Doc. 13 at 10-11.) Such a warning satisfies the consideration of alternatives requirement. *See Ferdik*, 963 F. 2d at 1262. Work had adequate warning that dismissal would result from his noncompliance. At this juncture, the Court can envision no further alternatives to dismissal.

The last factor weighs against dismissal because public policy favors disposition of cases on their merits. *Hernandez v. City of El Monte*, 138 F. 3d 393, 399 (9<sup>th</sup> Cir. 1998). In light of the other four factors favoring dismissal, however, the weight of this factor is slight. No further resources of the Court will be expended. This matter will be dismissed based upon Work’s failure to prosecute pursuant to Fed. R. Civ. P. 41(b).

### **Certificate of Appealability**

“The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Rule 11(a), Rules governing § 2254 Proceedings. A certificate of appealability should issue as to those claims on which

a petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The standard is satisfied if “jurists of reason could disagree with the district court’s resolution of [the] constitutional claims” or “conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where a claim is dismissed on procedural grounds, the Court also must decide whether “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (quoting *Slack*, 529 U.S. at 484).

Work has not made a substantial showing that he was deprived of a federal constitutional right. Further, because Work has failed to prosecute his petition, reasonable jurists would find no basis to disagree with this Court’s ruling. There are no close questions and there is no reason to encourage further proceedings in this Court. A certificate of appealability will be denied.

Accordingly, the Court enters the following:

**ORDER**

1. This matter is dismissed for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).
2. A certificate of appealability is denied.
3. The Clerk of Court is directed to close this matter and enter judgment in

favor of Respondents pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DATED this 22nd day of November, 2023.



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Brian Morris, Chief District Judge  
United States District Court